

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DEB SHELDEN,

Plaintiff,

v.

RICHARD T. SMITH, et al.,

Defendants.

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4:11CV3099

**MEMORANDUM
AND ORDER**

In a memorandum and order entered on October 24, 2011 (filing [14](#)), Magistrate Judge Zwart granted Plaintiff's motion to stay (filing [11](#)) and denied without prejudice Defendants' motion to dismiss (filing [9](#)). On November 3, 2011, Defendants filed a statement of objections (filing [15](#)).

After careful review conducted pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), [Fed. R. Civ. P. 72\(a\)](#), and [NECivR 72.2](#), I find that the challenged order is not clearly erroneous or contrary to law. Although not objected to by the Defendants, Judge Zwart lacked the power to deny the motion to dismiss as opposed to issuing a report and recommendation suggesting that the motion to dismiss be denied.

Without reaching the merits of the motion to dismiss, and particularly the issue of qualified immunity, I now independently decide that the motion to dismiss should be denied without prejudice pending the appeals in the related cases. Since this matter is stayed, and Defendants will not be subjected to discovery or motion practice, there is no harm to Defendants by denying the motion to dismiss without prejudice. In short, it makes sense to await the ruling of the Court of Appeals. Therefore,

IT IS ORDERED:

1. Defendants' statement of objections (filing [15](#)) is denied.
2. The Magistrate Judge's order entered on October 24, 2011 (filing [14](#)), is sustained and shall not be disturbed.

December 5, 2011.

BY THE COURT:

Richard G. Kopf
Senior United States District Judge